No. 12,230

IN THE

United States Court of Appeals

For the Ninth Circuit

DON DOROTHY and PACIFIC NORTHERN AIRLINES, INC. (a corporation),
Appellants,

vs.

C. A. McCANDLESS,
Appellee.

Upon Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF FOR APPELLEE.

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JURISDICTIONAL STATEMENT.

The appellee accepts generally the jurisdictional statement of the appellants, with particular reference to the provisions of 28 U.S.C.A. Sec. 225 (Judicial Code, Sec. 128).

STATEMENT OF THE CASE.

The Pleadings.

Appellee filed his complaint on October 6, 1947, alleging briefly: (1) that he was at all times the owner of a certain Stinson SR-9 aircraft, (2) that appellant

Dorothy, acting as agent of the co-appellant Pacific Northern Airlines, entered into a verbal agreement with appellee, whereby Dorothy was permitted to take the aircraft to a hangar for the purpose of having it examined and inspected in order to determine its value, (3) that two days later, in violation of this agreement, appellants wrongfully and unlawfully took possession of the aircraft and converted it to their own use by flying it to several towns and using it in the hauling of passengers and freight, (4) that while so engaged with the plane, appellants wrecked the aircraft and totally destroyed it, (5) that appellee has demanded the sum of $8,500.00 from the appellants, which was the reasonable value of the aircraft at the time of the conversion. (Tr. 2-5.)

The appellants, after their demurrers were overruled, answered separately, but their answers are substantially to the same effect. They deny any wrongful taking of the aircraft, or that its value was $8,500; they allege that they were entitled to the possession of the aircraft by reason of a rental agreement with appellee, and maintain that the plane was wrecked by reason of a mechanical failure of the brakes on landing, without negligence on their part in any manner. (Tr. 6-16.) The replies filed by appellee denied the existence of any rental or charter agreement, as well as the other allegations of the answers. (Tr. 16-18.)

The Evidence.

On September 4, 1947, appellee was engaged in working on his automobile parked near his trailer res-

idence, when he received a visit from appellant Dorothy. (Tr. 39-40.) Dorothy, a pilot for appellant Pacific Northern Airlines, testified that he had been instructed by the chief pilot to see if he could find an aircraft to rent for a few days, and that investigation had led him to appellee as the owner of a suitable plane. (Tr. 95-97.)

The evidence is conflicting as to the conversation which actually took place between the two men. Appellee's version is that Dorothy was primarily interested in purchasing the aircraft; that they discussed the plane and its value, and that he agreed to permit Dorothy to taxi the aircraft over to the Pacific Northern hangar for a mechanical inspection; there was some discussion of a possible rental agreement, but no definite agreement for rental or charter was reached. (Tr. 39-40, 49-50.) Appellee's version of the conversation was confirmed by his daughter, Grace, who overheard the conversation from the trailer a few feet away. (Tr. 65-66.) On the other hand, Dorothy maintained that he had entered into a definite rental or charter agreement with appellee, whereby Pacific Northern Airlines was to have the right to use the plane at a rate of $35.00 per hour. He admitted there had been some mention of a possible purchase of the aircraft during the conversation. (Tr. 95-97.)

On the following day, Dorothy taxied the plane over to the hangar, where the Pacific Northern mechanics gave it a thorough inspection. Later in the same day he returned the plane to the "line", tied

it down, and left the keys at another hangar which had been designated by appellee. (Tr. 97-98.) Two days later, Dorothy again took the ship, loaded it with freight and mail and flew it to Kenai. At Kenai, he began to make a series of trips between the Kenai field and the Libby cannery beach; on the second beach landing the right wheel of the plane "dug in" after the plane rolled about one hundred feet; the aircraft flipped over to the right in the mud and was totally destroyed by the incoming tide. (Tr. 98-101, 45.) There was conflicting testimony as to whether the particular aircraft involved was a safe plane to use in such beach operations. Raymond I. Peterson, an airline operator in the Territory for nearly 14 years, testified that he did not consider this Stinson a safe plane for beach operations, because of the small tires and wheels. Peterson had previously testified as a witness for the appellants, so his testimony may be considered as impartial. (Tr. 149-150, 134.) Various witnesses estimated the value of the aircraft in September, 1947, at $8,500, $9,500, $5,500 and $5,000. (Tr. 40, 47, 74, 82, 108, 138.)

Verdict, Judgment and Appeal.

The jury found that the appellee was entitled to recover the sum of $7,500.00 from appellants. (Tr. 190.) Judgment was entered accordingly, together with interest at the rate of six percent per annum, on March 26, 1948. (Tr. 21-23.) Appellants filed motions for judgment notwithstanding the verdict, and for a new trial, both of which were denied. (Tr. 20, 25.) Appellants thereupon filed their petition for appeal

on April 26, 1948, together with their assignments of error. (Tr. 26, 28.)

SUMMARY OF ARGUMENT.

A. The complaint states facts sufficient to constitute a cause of action.

1. The complaint states facts sufficient to constitute a cause of action, and the motions and demurrers addressed to it were properly denied and overruled by the trial court, under the rules of procedure in effect at the time of the trial.

2. No demand for the return of the bailed chattel need be alleged where it has been destroyed.

B. The complaint sets forth a plain statement of the claim showing that the plaintiff is entitled to relief under the Federal Rules of Civil Procedure, now in effect in the District Court for the Territory of Alaska.

1. The Court of Appeals, in considering a judgment on appeal, will dispose of the case according to the present law, rather than the law as it existed at the time of the judgment.

C. The instructions, as a whole, fully and fairly presented the issues to the jury.

ARGUMENT.

A. THE COMPLAINT STATES FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

The burden of appellants' brief is that the trial court erred in overruling the general demurrers to the complaint, on the ground that the complaint did not allege facts sufficient to constitute a cause of action. Although numerous errors are assigned, including a blanket allegation that the court erred in failing to give all of the instructions requested by the appellants, the only serious argument is addressed to the demurrers.

1. The complaint states facts sufficient to constitute a cause of action, and the motions and demurrers addressed to it were properly denied and overruled by the trial court, under the rules of procedure in effect at the time of the trial.

Appellants contend that the complaint in the present action is essentially one based on the common law action of trover, and maintain that such a complaint must contain all of the material allegations which were necessary at common law. Among those allegations, appellants insist, was a statement, in so many words, that the pleader was entitled to the immediate possession of the chattel at the time of the conversion.

Alaska, following the example of many of the states, early adopted a Code of Civil Procedure under which "all the forms of pleading heretofore existing in actions at law and suits in equity" were abolished. III A.C.L.A. Ch. 5, Sec. 55-5-1. Under the Code, in effect in Alaska at the time of the trial and judgment in the present case, a complaint is sufficient

which contains "a plain and concise statement of the facts constituting the cause of action, without unnecessary repetition". III A.C.L.A. Ch. 5, Sec. 55-5-32.

The common law action of trover or conversion developed in the seventeenth century as a branch of the action of trespass or case. In its original form the action was based on a series of fictions, the pleader alleging that he had "casually lost" a certain chattel, and that the defendant had "casually found" it and converted it to his own use. In this form the action speedily replaced the earlier action of detinue. See, Plucknett, *A Concise History of the Common Law,* 336; Radin, *Anglo-American Legal History,* 448. Stripped of the fictions, the essential elements of the action are: (1) a description of the property; (2) the plaintiff's right to such property; (3) the wrongful conversion; and (4) the value, or the damages sustained. *Brunswick-Balke-Collender Co. v. Brackett,* 37 Minn. 58, 33 N.W. 214; *Williams v. Gray,* 62 Mont. 1, 203 Pac. 524. As the Colorado court has said,

> "The complaint contained a much more detailed statement of the facts than was necessary, but it was good under *Littel v. Brayton Co.,* 70 Colo. 286, 201 Pac. 34. It follows, from the decision in *Baker v. Cordwell,* 6 Colo. 199, that all that is necessary under the Code is to allege that defendant took certain goods *of the plaintiff* (describing them) and converted them to his own use, which would be equivalent to trespass de bonis at common law, or that he came into possession of certain goods of the plaintiff (describing them) and converted them to his own use, which would be

> equivalent to trover at common law with the fictions eliminated. Under the phrase "of the plaintiff", the plaintiff may prove at the trial any kind of general or special property that will support his right of immediate possession of the goods at the time of the conversion, and under a denial that said goods were the goods of the plaintiff the deefndant may give any competent evidence tending to controvert the general or special property in plaintiff." *Casco Mercantile & Trust Co. v. Central Savings Bank,* 226 Pac. 868, at 869 (S. Ct. Colo.).

These principles with regard to pleading an action of conversion have been followed by the District Court for the Territory of Alaska, and confirmed by the Circuit Court of Appeals in the case of *Pioneer Mining Co. v. Mitchell,* 190 Fed. 937 (C.C.A. 9th, 1911). In that case the complaint alleged that defendants had entered upon plaintiff's mining claim, extracted gold, and appropriated and converted the same to their own use. This court said, at page 939,

> "The strong contention of counsel for plaintiffs in error is that the action is one of trespass quare clausem fregit, and, being such, the plaintiff must show actual or constructive possession, without which he cannot recover. If the action be technically such as is suggested, then it may well be conceded that counsel's conclusion should follow. Counsel for defendant in error contends, however, that the action is in the nature of a trespass de bonis asportatis, or trover, and is appropriate to recover the royalties that defendants received from the mine.

"Under the Alaska statute, all forms of action are abolished. Section 1, c. 1, tit. 2, Civil Code of Procedure of Alaska, 1 Fed. St. Ann. 55. Under this procedure, it is simply necessary to state the facts out of which the cause of action arises. 'And when', says the Supreme Court of Kansas, 'the plaintiff has stated the facts of his case he will be entitled to recover thereon just what such facts will authorize.' McGonigle v. Atchinson, 33 Kan. 726, 736, 7 Pac. 550, 553. Continuing, the court further says:

'We now look to the substance of things, and not merely to forms and fictions. If the facts stated by the plaintiff would authorize a recovery under any of the old forms of action, he will still be entitled to recover provided he proves the facts. If the facts stated would authorize one or two or more kinds of relief, he may then elect as to which kind of relief he will obtain; and the prayer of his petition will generally indicate his election.' * * * So in the present case we think the statement of facts quite sufficient to entitle the plaintiff to recover as for gold taken from the mine of plaintiff and converted to the use of the defendants. The complaint alleges that defendants entered upon the mine and extracted the gold, and appropriated and converted the same to their own use, and prays damages. And why should not the plaintiff be entitled to recover?"

The decision in the *Pioneer Mining Company* case sets forth no unique or unusual rule of pleading or statutory interpretation; to the same effect are the decisions of the great weight of existing authority. Oregon has identical provisions in its Code of Civil

Procedure (Oregon Code, Sec. 1-704), and that Court has said,

> "There is an interesting discussion in the briefs of counsel as to whether this is an action in trover or on trespass. We think the distinction of little consequence, although the complaint lacks many of the elements of an action of trover and none of those which are required in an action of trespass * * * However, the distinctions argued by counsel are not material here, as it was never the intent of our Code to require a pleader to conform his statement of facts to any of the common-law forms of action. If his complaint contains 'a plain and concise statement of the facts constituting his cause of action,' it is sufficient, although it may sound partly in trover and partly in trespass. The complaint here is sufficient." *Lun v. Mahaffey,* 185 Pac. 746 (S. Ct. Ore., 1919) at 748.

And, in interpreting the similar provision of the California law (Cal. Code Civ. Proc., Sec. 426) the California Supreme Court directed the trial court to overrule a demurrer, saying,

> "* * * as the demurrer was general, respondent rightly contends that the judgment should be affirmed if, for any other reason, the complaint does not contain a sufficient statement of facts to constitute a cause of action. And it is contended that the averment of conversion is not sufficient. The averment is, after a description of the property, that the defendants' testator 'unlawfully converted and disposed of the same to his own use', and the contention is that there should have been a statement of the particular

facts constituting the conversion; that is, the specific acts and methods by which the conversion was accomplished. This contention is not maintainable. An averment that defendant converted the property to his own use is a sufficient averment of the fact of conversion. It was so expressly held in *Daggett v. Gray,* 110 Col. 162, 42 Pac. 568, where the Court said: 'The allegation that defendants converted and disposed of the property to their own use is the allegation of a fact sufficient, in the absence of a special demurrer to sustain a judgment.'

"A more serious contention is that the complaint fails to sufficiently aver any ownership or right of possession by plaintiff in the property in question at the time of the alleged conversion. It is averred on this subject that on July 22, 1896, plaintiff was the owner of the property, and on that day delivered it to defendant's testator as security for a certain indebtedness owing to him by that plaintiff; that afterwards, on May 10, 1897, the said indebtedness was fully paid and discharged, and that on said last-named day, said property being in the possession of said testator, the latter 'well knowing that said bonds and coupons last aforesaid were the property of the said plaintiff, and should belong and appertain to him,' unlawfully converted the same, etc. This certainly is a crude, roundabout, and indirect averment of the fact that plaintiff was the owner of the property at that time; but, as against the general demurrer, under our liberal system of pleading, it is sufficient. *The intended statement of the fact is not couched in apt language, but there is not an en-*

> *tire absence of a statement of such fact. The averment could not have been true unless the plaintiff was the owner of the property, or entitled to its possession, at the time of the alleged conversion; and defendant could not have misunderstood the averment, or have been in any way prejudiced, by the form in which it was made."* (Emphasis supplied.) *Lowe v. Ozmun,* 137 Cal. 257, 70 Pac. 87, 88.

The closing remarks of the court in the case just cited are particularly pertinent in the present instance. The whole theory of appellants' answers and defense was based on a claim that *they* had the right to the immediate possession of the plane as bailees by reason of a rental or charter contract; there was no dispute as to ownership; appellants clearly understood the averments of the complaint and were not prejudiced in any way by the form in which they were made. In accord with the decisions previously cited in this regard are *Lafara v. Teal,* 61 N.E. 794 (Ind. App. 1901); *Terrien v. Joseph,* 53 Atl. (2d) 923 (S. Ct. R.I., 1947); *Phelan v. Vestner,* 54 S.E. 697 (S. Ct. Ga., 1906); *Rockwell v. Day,* 82 N.Y.S. 993 (App. Div., 1903); *Denver Livestock Commission Co. v. Lee,* 18 F. (2d) 11 (C.C.A. 8th, 1927).

The complaint in the present case not only alleged a general ownership of the aircraft by the appellee during the entire period, and that appellants wrongfully "took possession" of it, but also alleged that the appellants had wrongfully used the plane by flying it to certain points in violation of any limited

use which the appellee had previously authorized. The appellants made this the chief issue in their answers and in the evidence they presented, contending that the agreement gave them the right to use the plane on a rental basis. On this issue, it is fundamental that a bailee who misuses the property bailed by a departure from the terms of the bailment is guilty of conversion. Where there is such a conversion, the bailee will be liable for the full value of the property should it be destroyed, and it is immaterial whether the injury is the proximate result of the conversion, since the act of conversion itself renders the converter liable. 53 *Am. Jur.* "Trovers and Conversion", Sec. 51. Thus, the *Restatement,* "Torts", Sec. 227 states:

> "A bailee who is in possession of a chattel under a bailment which does not permit him to make any use of it is liable to the bailor for a conversion if he uses the chattel, unless the circumstances are such as to afford him a privilege to use it irrespective of the bailor's consent."

and, in Sec. 228:

> "A bailee who is in possession of a chattel under a bailment for use is liable to his bailor for a conversion if he so uses the chattel as to constitute a material breach of the contract of bailment unless he is otherwise privileged to do so."

So, in the present case, the appellee's complaint alleged and his proof demonstrated, that the only use appellants were to make of the plane was to taxi it down to the hangar for an inspection. Appellants

violated this bailment contract, if such it was, by flying the plane extensively and at a distance in the course of their own business; in the course of this unauthorized use the plane was totally destroyed. Clearly the appellants were guilty of conversion, as alleged in the complaint. Thus, in *Baxter v. Woodward,* 158 N.W. 137 (S. Ct. Mich., 1916) the defendant had driven and wrecked an automobile left with him for storage and sale by the plaintiff. The court said,

> "The general rule is that if a bailee, having authority to use a chattel in a particular way, uses it in a different way, or to a greater extent than authorized, such unauthorized use is a conversion of the chattel, for which the bailor may maintain trover for its value. It is a conversion for a bailee for hire, to apply the thing hired to a purpose other than that agreed upon in the contract of hire. This principle has been applied where a horse was killed or injured while being driven or ridden by the hirer to a place not mentioned in the contract of hire." (Citing many cases.) 158 N.W. 139.

To the same effect is *Vermont Acceptance Corporation v. Wiltshire,* 153 Atl. 199 (S.Ct. Vt., 1931); *Annotation,* 26 L.R.A. 366. With regard to the use or misuse of the bailed property there is no distinction between a horse, an automobile, or an aircraft; the general rules of bailment apply to each with equal effect. *Whitehead v. Johnson,* 268 N.Y.S. 368 (App. Div. 1934); *Ogden v. Transcontinental Airport,* 180 N.E. 737 (Ohio, 1931); and see *United Air Services v. Sampson,* 86 Pac. (2d) 366 (Calif. 1938).

2. No demand for the return of the bailed chattel need be alleged where it has been destroyed.

Appellants contend, in their brief, that the complaint in the present case is further lacking in that it fails to allege a demand for the return of the aircraft. It is perfectly true that the complaint contains no such allegation, nor is such an allegation necessary. A demand is never necessary unless the facts alleged indicate that the defendant was in lawful possession of the property; in the instant case the complaint specifies that the appellants "wrongfully and unlawfully took possession" of the aircraft. A demand must be alleged only where the conversion is based on the refusal to return the property after such a demand; no demand need be stated where the other facts pleaded show the conversion. *Vermont Acceptance Corporation v. Wiltshire,* 153 Atl. 199, 73 A.L.R. 792 (S.Ct. Vt. 1931). In that case, the defendant had purchased an automobile on a conditional sales contract. Thereafter he used it in bootlegging, and it was seized and forfeited to the Government, in violation of the contract which forbade any use of the vehicle in connection with a law violation. The court, after establishing that this use of the automobile constituted a conversion by the bailee, pointed out that no allegation of demand and refusal was necessary "when the conversion is otherwise established as it is here". 75 A.L.R. 799. See also *Baxter v. Woodward,* 158 N.W. 137 (S.Ct. Mich.); *Terrien v. Joseph,* 53 Atl. (2d) 923 (S.Ct. R.I. 1947). Compare *Jeffries v. Pankow,* 229 Pac. 903 (S.Ct. Ore. 1924) where the court said:

> "In such case, no cause of action in trover or conversion will lie against him without a demand for the return of the property, *unless it shall further appear that the defendant has put it beyond his power to comply with the demand, so that a demand would be useless.*" (Emphasis supplied.) 229 Pac. 903 at 905.

Obviously, a demand is never necessary, because futile, where the chattel is totally destroyed, as was alleged by plaintiff in his complaint in the present case. *American Surety Co. v. Baker,* 172 F. (2d) 689 (C.C.A. 4th, 1949).

B. THE COMPLAINT SETS FORTH A PLAIN STATEMENT OF THE CLAIM SHOWING THAT THE PLAINTIFF IS ENTITLED TO RELIEF UNDER THE FEDERAL RULES OF CIVIL PROCEDURE, NOW IN EFFECT IN THE DISTRICT COURT FOR THE TERRITORY OF ALASKA.

By Chapter 343, Public Law 175, 81st Congress, the Federal Rules of Civil Procedure were made applicable to the District Court for the Territory of Alaska and to appeals therefrom. The Act was approved July 18, 1949.

Under the Federal Rules of Civil Procedure, now in effect in the Territory, the plaintiff, after alleging jurisdiction and demand for judgment, need only allege that: "On or about September 6, 1947, the defendants converted to their own use one Stinson aircraft, SR-9 Type, Number NC 18411 of the value of $8,500.00, the property of the plaintiff." Form 11, "Complaint for Conversion", Federal Rules of Civil

Procedure, 28 U.S.C.A. foll. Sec. 723c. As Judge Lindley said in passing on a similar complaint, on motion to dismiss:

> "The validity of the pleading is to be determined under the Federal Rules of Civil Procedure, 29 U.S.C.A. foll. Sec. 723c. By Rule VIII the term, 'cause of action' is abandoned and in its place is substituted 'claim for relief'. The rule prescribes a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for the relief to which he deems himself entitled.
>
> "Tested by these requirements, I deem the complaint sufficient. It avers that certain oil belonged to and was the property of the plaintiff; that defendants took, converted and disposed of the same to their own use. The prayer is for recovery of damages of $50,000.00. To my mind, these averments constitute a valid claim for relief for conversion of personal property, alleged to belong to plaintiff." *Piersol v. Bendum Trees Oil Corp.,* 2 F.R.D. 133, 134; in accord, *U. S. v. Fleming,* 69 F. Supp. 252 at 258.

1. The Court of Appeals in considering a judgment on appeal will dispose of the case according to the present law rather than the law as it existed at the time of judgment.

Since the complaint is sufficient under the Federal Rules of Civil Procedure, currently in effect, the judgment of the trial court overruling the demurrers should be affirmed on appeal. Any error which the trial court might have committed in refusing to dismiss the complaint has been corrected by an intervening act of Congress applicable to the trial court's procedure, and the Court of Appeals should conform its disposition of the case to the procedure now existing in the trial court,

even though such procedural change took effect after the entry of the judgment.

The general rule, supported by the great weight of authority, is that an appellate court, in reviewing a judgment on appeal or error, will dispose of the question according to the law prevailing at the time of such disposition and not according to the law prevailing at the time of the rendition of the judgment. This procedure will be followed even though it may be necessary to reverse a judgment which was correct at the time it was rendered, or to affirm a judgment which was erroneous at the time it was rendered. 111 A.L.R. 1317 at 1318; 2 *Am. Jur.* P. 668, "Appeal and Error", Section 1157.

The basis for this line of decision rests on *United States v. The Peggy,* 1 Cranch (U.S.), 103, 2 L. Ed. 48:

> "It is in the general true that the preview of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." (1 Cranch (U.S.) 103 at 110.

Thus, in *Dismore v. Southern Express Company,* 183 U.S. 115, 46 L. Ed. 111 (1901) plaintiffs brought suit to enjoin the express company from using any of its money for the purchase of stamps to be placed upon bills of lading, as required by the War Revenue Act of June 13, 1898. The case was heard in the District Court upon demurrers to the bills, and an

order entered on March 7, 1899, refusing to enjoin the express company from voluntarily paying the tax, but enjoining the State officials from collecting it. Upon appeal, the Circuit Court of Appeals reversed the decree on June 7, 1900, with directions to dismiss the case. After the submission of the case to the Supreme Court on certiorari, the War Revenue Act of 1898 was amended by Congress on March 2, 1901, so as to expressly exempt express companies from the operation of the Act. Under these circumstances, the Supreme Court affirmed the order directing the dismissal of the suit, giving full effect to the 1901 amendment. Although the case had been submitted to the Supreme Court prior to the amendatory act, the court pointed out that the intervening law had positively changed the governing rule and must be obeyed.

Again, in *Missouri, ex rel. Wabash Railway Company v. Public Service Commission,* 273 U.S. 126, 71 L. Ed. 575, a new state statute on the subject of the litigation had interposed between the decision below and the decision of the Supreme Court. Since the effect of the new statute was to give the State Commission certain administrative discretion, the Supreme Court, giving effect to the statute, reversed the judgment below and remanded the cause for further proceedings.

In *Carpenter v. Wabash Railway Company,* 309 U.S. 23, 84 L. Ed. 558, the Bankruptcy Act had been amended to grant certain priorities after the decision in the lower court, and while the case was pending before the Supreme Court upon petition for certiorari. The lower court had correctly denied the priori-

ties under the Bankruptcy Act as it existed at the time of its decision. The Supreme Court assumed without deciding that the determination of the court below was correct upon the record before it and in the light of the law as it then stood, but went on to state, "* * * it is our duty to consider the amended statute and to decide the question in harmony with its provisions, if found to be applicable." 309 U.S. 27. Accordingly, the judgment below was vacated and the cause remanded with directions to allow the priority.

The same principle will be applied whether the change in the rule of decision be accomplished by statute or treaty, or by a new decision of the controlling court. In *Vandenbark v. Owens-Illinois Glass Company,* 311 U.S. 538, 85 L. Ed. 327, plaintiff brought suit in the U. S. District Court for the Northern District of Ohio (based on diversity of citizenship) alleging that she had contracted various occupational diseases through the negligence of the defendant. The trial court sustained a motion to dismiss on the ground that the petition failed to state a cause of action, which ruling was affirmed by the Circuit Court of Appeals. The basis for these decisions was that under the law of Ohio, no recovery was permitted at the time of the judgment in the trial court for the types of occupational diseases covered by the petition. However, after the action of the trial court in dismissing the petition, the Ohio Supreme Court reversed its former decisions and, in an opinion expressly overruling them, declared such occupational diseases compensable under the Ohio common law. Applying its previous decisions, the Supreme Court

held that the judgment must now be reversed, since "the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the *then* controlling decision of the highest state court." 311 U.S. 543.

C. THE INSTRUCTIONS, AS A WHOLE, FULLY AND FAIRLY PRESENTED THE ISSUES TO THE JURY.

Appellants requested twenty-one specific instructions at the trial, and have generally assigned error on the refusal of the Court to give all of these instructions. (Tr. 6-12.) The brief nowhere specifies the "grounds of the objections urged at the trial" to the refusal to give these instructions, as is required by Rule 20 of the rules of this court.

A general exception to the giving or refusing to give a series of instructions is insufficient, and an exception to the charge in its entirety is not available if any one of the portions of the charge excepted to is given. As the court pointed out in *Harrington v. United States,* 267 Fed. 97 (C.C.A. 8th, 1920):

> "When a number of instructions are requested, containing distinct propositions of law, a general assignment of error to the refusal to give them all cannot be sustained, if any one of the instructions is properly refused." 267 Fed. 97, at 104.

In the instant case, the trial court gave a general charge to the jury, which fully covered all of the law involved in the proceedings. Appellants have not attempted to criticize separate passages or portions of

the charge. Considered as a whole, the instructions of the court fairly and substantially presented to the jury the issues to be decided, and the judgment should not be disturbed on appeal. *Goodyear Fabric Corp. v. Hirss,* 169 Fed. (2d) 115 (C.C.A. 1st 1948); *Rowe v. Dixon,* 196 Pac. (2d) 327 (S. Ct. Wash. 1948).

CONCLUSION.

In summarizing, appellee submits:

1. The complaint stated facts sufficient to constitute a cause of action for conversion under the Alaska Code of Civil Procedure, and the trial court was correct in overruling and denying the demurrers and motions addressed to it.

2. The validity of the complaint is now governed by the Federal Rules of Civil Procedure, and the complaint adequately states a claim under those rules.

3. The instructions of the court fairly and substantially presented to the jury the issues of the case within the reasonable discretion of the trial court.

Wherefore, appellee submits that the judgment of the trial court should not be disturbed and that the judgment should be affirmed.

Dated, Anchorage, Alaska,
December 23, 1949.

Respectfully submitted,
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Attorneys for Appellee.